

NO. 48645-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JESSE EISENHOWER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

Before the Honorable Christopher Melly

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in imposing an alcohol-related prohibition as a condition of community custody because the prohibition was not crime-related and therefore exceeded the trial court's authority.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where the evidence did not show use of alcohol was directly related to the offenses, did the court err when it prohibited Mr. Eisenhower from entering places where alcohol is the chief item for sale as a condition of community custody?

C. STATEMENT OF THE CASE

Jesse Eisenhower was charged by information filed in Clallam County Superior Court on July 17, 2015, with one count of second degree taking a motor vehicle without the owner's permission. Clerk's Papers (CP) 47. The prosecutor filed an amended information on January 8, 2016, adding one count of escape in the second degree, and filed a second amended information on February 23, 2016, adding a count of possession of methamphetamine, which was designated as Count 2. CP 36. Mr. Eisenhower entered an *Alford*¹ plea to second degree taking a motor vehicle, possession of methamphetamine, and third degree escape on February 23,

2016. Report of Proceedings (RP) (2/23/16) at 2-8 ²; CP 26.

The court sentenced Mr. Eisenhower to a standard range sentence of 29 months in Count 1, 24 months in Count 2—to be served concurrently, and 90 days in Count 3, to be served consecutive to Counts 1 and 2. CP 16. The court also sentenced Mr. Eisenhower to 12 months of community custody in Count 2 and imposed several conditions as part of community custody, including the following:

The court orders that during the period of supervision the defendant shall:

Consume no alcohol

...

8. You shall abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale.

CP 16, 17, 18.

Defense counsel objected to the prohibition against entering “places where alcohol is the primary item of sale.” RP (2/23/16) at 24.

This appeal follows.

D. ARGUMENT

1. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY PROHIBITING MR. EISENHOWER FROM ENTERING ANY

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

²The verbatim report of proceedings is contained in one volume and consists of the following hearing dates: 1/22/16, 1/29/16, 2/19/16, and 2/23/16.

**PLACE WHERE ALCOHOL IS THE CHIEF
ITEM OF SALE BECAUSE THE
PROHIBITION WAS NOT CRIME RELATED.**

The sentencing court ordered Mr. Eisenhower to refrain from consuming alcohol and to refrain entering any place where alcohol is the chief item for sale. CP 17, 18. (Community custody condition 8).

A court may impose only a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

The court's decision to impose a crime-related prohibition is reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). See also, *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201

(2007). Prohibitions are usually upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. Appendix A. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Under RCW 9.94A.703(3)(e), a sentencing court may order an offender to refrain from consuming alcohol; therefore the court had discretion to order Mr. Eisenhower "to comply with any crime-related prohibitions" including to bar consumption of alcohol, which is specifically delineated in the statute. Such a condition is authorized regardless of whether alcohol contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (examining former 9.94A.700, which contained the same operative language as RCW 9.94A.703(3)(e)).

Regarding the second half of the clause pertaining to community custody condition 8, however, the only possible authority for the condition prohibiting entry into locations where alcohol is the principal item of sale is

RCW 9.94A.703(3)(f), which authorizes the court to impose crime-related prohibitions. A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).³ Such a prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished.

Substantial evidence must support a determination that a condition is crime-related. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007). Here, no evidence showed alcohol played any role in contributing to Mr. Eisenhower's offenses or that alcohol was in any way related to its circumstances. No affirmative evidence showed Mr. Eisenhower had used alcohol or was under its influence at the time of the offenses. See also, *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

Although the SRA permits a court to prohibit the consumption of alcohol, the imposition of the condition that Mr. Eisenhower not enter businesses selling alcohol as its primary item of sale was erroneous because the

³ RCW 9.94A.030(10) provides: "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

condition was not "directly relate[d]" to the circumstances of the crimes of conviction. *Parramore*, 53 Wn. App. at 531.

In *State v. Jones*, the court struck community custody conditions requiring the defendant to participate in alcohol and mental health treatment and counseling. Jones pleaded guilty to first degree burglary and "other crimes," and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. *Jones* 118 Wn. App. 199, 202-03, 76 P.3d 258 (2003). Nothing suggested that alcohol contributed to the defendant's offenses. *Id.* at 207-08. On appeal, the Court found the trial court had authority to prohibit alcohol consumption but it could not order the defendant to participate in alcohol counseling because the counseling was not related to the crime. *Id.* at 206-08.

Similarly, in this case the challenged clause in condition 8 barring Mr. Eisenhower from entry into places where alcohol is the primary item of sale was not crime-related, or even related to the circumstances of the taking a motor vehicle, possession of methamphetamine, and third degree escape. There was no evidence in the record that the charges were augmented, precipitated, or influenced in any way by alcohol. Because there was no evidence, and the

court did not specifically find that alcohol contributed to the offenses, the prohibition was not a valid crime-related prohibition. RCW 9.94A.030(10).

Where the trial court exceeds its authority in imposing an invalid condition of sentence, the remedy is to remand to the trial court and direct the court to strike the offending condition or conditions. See *Jones*, 118 Wn.App. at 212 ("On remand, the trial court shall strike the condition pertaining to alcohol counseling."). This Court must therefore remand the matter to the court with the direction that the lower court strike the challenged condition as being unrelated to the crimes for which Mr. Eisenhower was convicted.

E. CONCLUSION

Based on the foregoing arguments the challenged community custody conditions should be vacated to comply with constitutional and statutory requirements.

DATED: July 13, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

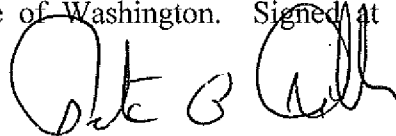
PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 13, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 13, 2016.



PETER B. TILLER

APPENDIX A

RCW 9.94A.703

Community custody—Conditions.

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) Mandatory conditions. As part of any term of community custody, the court shall:

- (a) Require the offender to inform the department of court-ordered treatment upon request by the department;
- (b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;
- (c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;
- (d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

- (a) Report to and be available for contact with the assigned community corrections officer as directed;
- (b) Work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
- (d) Pay supervision fees as determined by the department; and
- (e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

- (a) Remain within, or outside of, a specified geographical boundary;
- (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative

conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from possessing or consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) Special conditions.

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

TILLER LAW OFFICE

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Transmittal Letter

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